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No. 88-612

In the Supreme Court of the United States

OCTOBER TERM, 1988

JAMES A. ROBINSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial judge erred by admitting into evidence statements made by petitioner six months after he was interviewed under hypnosis.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-23a) is reported at 26 M.J. 361. The opinion of the Air Force Court of Military Review (Pet. App. 24a-44a) is reported at 21 M.J. 937.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 15, 1988. The petition for a writ of certiorari was filed on October 12, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. IV) 1259(3).

STATEMENT

Following a general court-martial at Kapaun Air Station in West Germany, petitioner, a member of the United States Air Force, was convicted of rape, forcible sodomy,

and premeditated murder, in violation of Articles 120, 125, and 118 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920, 925, and 918. He was sentenced to confinement for life, a dishonorable discharge, a reduction in rank to airman basic, and the total forfeiture of all pay and allowances. The convening authority approved the findings and sentence, except that he reduced the forfeiture of pay. The Air Force Court of Military Review affirmed the findings and sentence. The Court of Military Appeals affirmed.

1. In the early morning hours of April 14, 1982, the battered, semi-nude body of Senior Airman Nancy Nittler was found in the building of her duty station at Ramstein Air Base in West Germany. Tr. 4094-4096. On the night of her death, she had served as the Civil Engineering night dispatcher, handling evening and nighttime emergency calls. Tr. 693-694. The forensic examination of her body showed that she had been beaten, strangled, raped, anally sodomized, and ultimately killed by two stab wounds to her neck, one of which severed her jugular vein. Pet. App. 25a-26a; Tr. 766-785, 3447-3459, 3470-3518; PXs 15-26.

Two days later, petitioner told a co-worker that he had driven past the crime scene on the night of the murder and had seen "some guy behind the window." Petitioner made clear that the person he had seen was a Sergeant Banville. Tr. 931-935. Later that day, petitioner approached agents of the Office of Special Investigations (OSI) who were investigating the murder. Petitioner volunteered that he had driven by the victim's building and had seen a tall, shadowy male figure wearing a dark shirt standing the service desk area. Tr. 949-950. Petitioner mentioned that the person he had seen could have been an Airman Curtis. Tr. 950. Petitioner agreed to undergo hypnotic interviews with the OSI on April 27 and 29 to refresh his recollection

of the events. Pet. App. 4a-5a, 27a-28a; 23 Tr. AX (unnumbered), at 5.

Prior to the first session, petitioner gave a brief account of what he saw: a slim white male making a swinging motion with his arms, while his body was leaning into the effort. 23 Tr. AX (unnumbered) at 6. During the first hypnotic session, petitioner said that the person he saw through the window was swinging a pipe and was tall, white, with a slim build and light-colored hair. *Id.* at 19. He also said that the person he saw was wearing a red or green plaid shirt, weighed about 150 pounds, and was approximately 5'6" tall. *Id.* at 19, 21, 27. On April 29, during the second hypnotic interview, petitioner added that he could see another figure in the room who was smaller than the first man. *Id.* at 39. Petitioner stated that he saw the larger man strike the shorter one, and that, based on the fact that his hair protruded, the shorter man looked like one Captain Fuller. *Id.* at 48. Petitioner also said that the object that the assailant used to strike the victim resembled a microphone. *Id.* at 49. After the hypnotic portion of the interview was completed, petitioner stated his opinion that the assailant looked like the victim's husband, but was taller and heavier. *Id.* at 54; Pet. App. 5a, 28a.

One evening approximately two months later, petitioner walked into the service call desk area and spoke to a coworker. Tr. 984-985. Petitioner was extremely upset and emotional at the time. He said that he felt terrible about Nancy Nittler's death, and he mentioned that he wanted to talk to the OSI about it. Tr. 989. The OSI was summoned. As he awaited their arrival, petitioner said that a Staff Sergeant Brownell had killed Nancy. Tr. 991. Petitioner related that Brownell and the victim had been having an affair and that on the night of the murder he saw a black man with kinky hair making striking motions in the service call desk area. Tr. 992. When the OSI agents arrived, peti-

tioner told them that he had seen a late model yellow Buick Electra in the parking lot. Tr. 1016. Petitioner stated that he had purposely withheld that information from the OSI because he wanted to find the owner of the car and "lure him out." *Ibid.* Four days later, petitioner gave the OSI a written statement (PX 28), and he also explained that he had lied to the OSI agents during the hypnotic session about seeing figures through the window. He said that he had actually seen the image as a "vision" 15 minutes after he had returned home. Tr. 1020-1021. In that "vision," petitioner said, he had seen the victim being strangled and had seen blood on her face and forehead. Tr. 1021; Pet. App. 6a-7a.

During the next two months, petitioner volunteered information to the OSI and co-workers on several other occasions. Each time, petitioner gave a slightly different version of what he did and what he saw on the night of Nancy Nittler's murder. Pet. App. 15a. On September 15, petitioner approached his supervisor, Captain Fuller, in an intoxicated and distressed state, and he implied that he could have prevented the crime or could identify the murderer. Tr. 1046-1048. Captain Fuller, petitioner, and two others then returned to the scene of the murder to re-enact the crime. Tr. 1049-1052. Based upon what he saw at the scene of the crime, Captain Fuller concluded that petitioner could not have seen what he said he saw on the night in question. Tr. 1055; Pet. App. 7a, 28a.

Two OSI agents ultimately interviewed petitioner as a suspect on October 19. Tr. 1082, 1092-1093. During the initial part of the interview, petitioner related the same story that he had told them previously. Tr. 1084-1092. As the interview progressed and the agents challenged petitioner's story, however, that story began to change. First, petitioner admitted that he had actually walked up to the window, peered inside the room, and witnessed the events. Tr.

1094-1095. Later, after being confronted with the fact that the OSI had seized the jacket he wore that night, petitioner admitted that he had entered the building. Tr. 1102-1103. Petitioner said that he had seen the victim lying on the floor and that an unknown assailant had shoved him to the floor. Tr. 1103-1104. Petitioner then left the building, waited at his car, and re-entered the building 15 minutes later. Tr. 1104. When he returned, the victim's body was no longer in the room. Petitioner went to the service call area and straightened up the room. Tr. 1105-1107. He then followed a trail of blood to another room and saw the body. He described in detail the position and appearance of the victim. Tr. 1108. In fact, petitioner corrected one of the agents in describing the position of the body. Tr. 1108-1110, 1224-1225. Later, when confronted with the fact that sperm had been found in the victim's body and that the autopsy showed that she might have been alive when she was raped, petitioner admitted that he had partially disrobed and then had sexual intercourse with her while she was lying on the floor. Tr. 1115-1118. As the interview progressed, petitioner gave varying explanations about how blood could have gotten on his jacket (Tr. 1118-1122), and he ultimately concluded that he was "sixty to seventy percent" certain that the person who shoved him to the floor was one Ron Stenson, a co-worker. Tr. 1123-1124, 1242, 1245-1246; PX 32. Petitioner said that after having sexual intercourse with the victim, he left the building, drove home, opened a can of beans, sat down in a chair and watched television, went to bed, and had "a good night's sleep." Tr. 1127-1128. The interview then ended. After shaking hands with the interviewing agents and saying that he felt better after talking to them petitioner agreed to return the next day and continue the interview. Tr. 1128-1129, 1133. Petitioner did not return the next day, however; instead, he saw a psychiatrist and ulti-

mately reverted to his original story in which he said that he had merely driven by the building where the murder took place. Tr. 1129, 1784.

2. At trial, the defense moved to suppress petitioner's October 19 statements on the ground that they were involuntary and unreliable. Tr. 4138-4139; AX 17. As part of that claim, the defense alleged that the April 1982 hypnotic interviews had led petitioner to believe in events that were not true and had caused him to become vulnerable to the "suggestiveness" of the OSI agents who interviewed him six months later. Tr. 4138. Based on an extensive evidentiary presentation, the trial judge found that petitioner's October 19 statements were freely and voluntarily made. Pet. App. 45a-46a. The trial judge also found that the hypnotic interviews in April had no effect on petitioner's October statements. *Ibid.*; Tr. 4170-4171.

3. The Air Force Court of Military Review affirmed. Pet. App. 24a-44a. After examining the record, the court agreed with the trial judge's findings that petitioner's October statements were voluntary, were not affected by the April hypnotic sessions, and were sufficiently corroborated to support his conviction. *Id.* at 38a-43a. The court also rejected petitioner's argument that post-hypnotic statements should be inadmissible per se, or that they should be admissible only if rigorous safeguards to assure reliability are used during a hypnotic session. The court observed that other courts had adopted such procedures only for determining the admissibility of statements made while a witness is in fact undergoing hypnosis, and not for determining the admissibility of statements made several months afterwards regarding matters that were neither discussed nor revealed during hypnosis. *Id.* at 36a.

4. The Court of Military Appeals also affirmed. Pet. App. 1a-23a. After scrutinizing the various factors show-

ing that petitioner's October statements were reliable and noting that the defense was allowed to present expert testimony to the contrary (*id.* at 14a-15a, 21a-23a), the court found that the trial judge had properly admitted petitioner's October statements.

ARGUMENT

The sole question petitioner presents is whether there should be a per se rule of exclusion for hypnotically refreshed statements, or a rule demanding that rigorous procedural safeguards be used during a hypnotic session before hypnotically refreshed statements can be introduced at trial. This case does not present that question, however, because the only statements introduced by the government at trial were not affected by the hypnotic sessions.

The prosecution did not introduce the statements petitioner made during the April 27 and 29 hypnotic sessions. On the contrary, those statements were introduced by the defense (Tr. 1528-1529, 1679-1718). The government did introduce the statements petitioner made during the October 19 interview, but petitioner was not under the influence of hypnosis at that time. The trial judge (Pet. App. 46a), the court of military review (*id.* at 39a-43a), and the Court of Military Appeals (*id.* at 22a-23a) found that the April hypnotic sessions had no effect on petitioner's October statements to the OSI. In so ruling, those courts relied on several considerations: [of time (about six months) elapsed between the hypnosis and petitioner's later statements; there was a great disparity in the substance of the two statements; the hypnosis was conducted by a highly qualified expert under circumstances that minimized the likelihood of improper suggestion; petitioner did not display a willingness to accept blindly the agent's suggestions during the October interview, and in one instance petitioner convinced one of the agents that the

agent's account of the crime was in error and that petitioner was correct; and, finally, one expert even expressed doubt that petitioner was in a hypnotic state during the April sessions. *Id.* at 22a-23a; Tr. 1659-1660. Those concurrent findings do not warrant review by this Court. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, No. 85-1626 (June 19, 1987), slip op. 7-8; *United States* v. *Doe*, 465 U.S. 605, 613-614 (1984).

Those findings are also amply supported by the record. In fact, even the expert witnesses called by the defense could not conclude that the April hypnotic sessions left an impression on petitioner and caused him to make false statements six months later. Dr. Martin Orne, one of the nation's leading experts on forensic hypnosis, conceded that there was no direct connection between the April hypnotic sessions and petitioner's October admissions (Tr. 2478), and that it would be unique in his experience for hypnosis to cause someone falsely to confess six months afterwards. Tr. 2317, 2431-2432, 2463-2464; Pet. App. 13a & n.7. Another defense expert, Dr. Russell Hibler, stated that he saw no connection between the April hypnosis and petitioner's October statements. Tr. 3752. The third defense expert witness, Dr. Neil Hibler, also stated that he could not envision any such connection. Tr. 1719. Petitioner did not testify and offer any such claim. Finally, the excerpts cited by petitioner (Pet. 6) from the testimony of other defense witnesses do not support his claim that the April hypnotic sessions had an influence on him in October.* The trial court therefore did not err by admitting petitioner's October statements.

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* Dr. Mareth did not testify that petitioner was still under the influence of hypnosis when he spoke with the OSI agents in October. In fact, Dr. Mareth gave three possible explanations why petitioner may have given the October statement to the OSI agents: (a) petitioner was guilty and made up the story to explain the facts he believed were

The cases petitioner cites address an issue very different from the one presented in this case. The question of the admissibility of a witness's hypnotically refreshed testimony typically arises when the witness to a crime (often the victim) testifies at trial after a hypnotic session and identifies the defendant as the perpetrator. In such a case, the arguments commonly offered by the defense to exclude the witness's testimony are that the hypnosis has rendered the witness's testimony unreliable, and that hypnosis prevents the defendant from effectively cross-examining the witness. See, *e.g.*, *Harker* v. *Maryland,* 800 F.2d 437, 441-443 (4th Cir. 1986).

In this case it was petitioner who was hypnotized, and he is attempting to exclude his own admissions made six months after a hypnotic session in which he voluntarily participated. There was, therefore, no impairment of ef-

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known to the OSI; (b) petitioner was a shy person and made up the story to appear self-important; or (c) petitioner saw the murder, felt guilty about being unable to prevent it, and made up the story to ease his conscience. Tr. 3084-3085. The testimony by Dr. Hoyer that petitioner quotes (Tr. 3303) also does not attribute petitioner's statements to the April hypnosis. In fact, Dr. Hoyer admitted that he had "very little experience and very little training in hypnosis" (Tr. 3260), that he relied on what Dr. Orne, one of the defense experts, had told him (*ibid.*), that he "never meant to imply that the process of the investigation, the hypnosis, et cetera, would just fill in the gaps in the memory alone" (Tr. 3275), and that he developed a hypothesis explaining petitioner's October statements before he spoke with Dr. Orne. Tr. 3230. Dr. Hoyer's explanation for petitioner's statements was that they may have been the product of three factors: (a) petitioner was intoxicated at the time of the murder; (b) petitioner suffered from alcoholic blackouts and may have attempted to fill in the details of what he saw that night; and (c) petitioner believed that he was capable of "psychic" experiences. Tr. 3222-3225. Dr. Hoyer admitted, however, that the sanity board, of which he was a member, "did not make any definitive statements or arrive at any definitive conclusions as to [petitioner's] state of mind at the time [of the October statements]." Tr. 3222.

fective cross-examination of any witness, and petitioner was free to explain his incriminating admissions as being the product of his earlier hypnosis. Once the courts found that petitioner's admissions were voluntary and sufficiently reliable to be admitted, the question whether the admissions should be credited or not was properly left to the trier of fact. Accordingly, this case does not provide a suitable vehicle for addressing the broad questions presented by petitioner regarding the use at trial of a witness's hypnotically refreshed testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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